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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 549

JENNINGS-WATTS OIL COMPANY, INCORPORATED,

Petitioner,

vs.

CORNELIUS GILBERT, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GILBERT STORAGE AND TRANSFER COMPANY, ET AL.

(In the Case of Cornelius Gilbert, Doing Business, Etc., Plaintiff, versus Gulf Oil Corporation, Defendant)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

ROYSTON JESTER, III,
Lynchburg, Virginia;
MAC ASBILL,
Washington, D. C.,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner, Jennings-Watts Oil Company, Incorporated, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the Western District of Virginia which denied its motion for leave to intervene in an action pending in that Court.

Opinion Below

No opinion was rendered by the United States Court of Appeals for the Fourth Circuit.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered January 5, 1951 (R. 50). Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

Questions Presented

Jennings-Watts Oil Company, Incorporated, petitioner herein, is a distributor of petroleum products of Gulf Oil Corporation. Petitioner is bound by a contractual obligation to indemnify Gulf against all claims resulting from petitioner's operation as distributor. There is pending in the United States District Court in Virginia an action brought by Gilbert against Gulf to recover for damages resulting from the alleged negligence of petitioner in delivering gasoline to Gilbert's building. A judgment for Gulf in this action was reversed on appeal. Following this reversal Gulf brought an action against petitioner on the indemnity agreement for indemnification against Gilbert's claim against Gulf. Within one week after Gulf instituted its action against petitioner, and more than two months before the date set for retrial of the action by Gilbert against Gulf, petitioner moved to intervene in the latter action. Intervention was denied by the District Court for the stated reasons that the matter was neither timely nor did it appear that representation of applicant's interests by existing parties was or might be inadequate, and its judgment was affirmed by the Court of Appeals for the Fourth Circuit without opinion.

The questions presented are:

1. Whether an application by an indemnitor to intervene as of right in an action against its indemnitee is timely, within the meaning of Rule 24(a) of the Federal Rules of Civil Procedure, when filed more than two months before the date set for trial and where no delay or inconvenience would result from the allowance of the intervention.

2. Whether the representation of an indemnitor's interest by counsel for the indemnitee in an action brought against the latter by a third party is or may be inadequate within the meaning of Rule 24(a)(2) of the Federal Rules of Civil Procedure when the same counsel represent the indemnitee in its action against the indemnitor under the indemnity agreement.

Federal Rule of Civil Procedure Involved

Rule 24(a) of the Federal Rules of Civil Procedure reads as follows:

> "RULE 24. INTERVENTION.
>
> "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." As amended Dec. 27, 1946, effective March 19, 1948. (28 USCA, Rule 24).

Statement

On November 1, 1939 petitioner entered into a contract with the Gulf Oil Corporation under which petitioner

undertook the marketing of Gulf's products in Virginia on commission (R. 24). The contract is still in effect and was binding between petitioner and Gulf on March 8, 1944.

Paragraph TENTH of said contract reads in part:

> "* * * said consignee [petitioner] shall not represent itself as an agent or employee of the consignor [Gulf Oil Corporation], nor does the consignor [Gulf Oil Corporation] assume any responsibility for the acts or omissions of the consignee [petitioner], its servants or employees in the management or operation of said business, negligent or otherwise, and the consignee [petitioner] covenants and agrees to indemnify the consignor [Gulf Oil Corporation] against any and all such claims." (Brackets inserted) (R. 27).

Petitioner and Gulf have recognized said contract, conducted their business relations pursuant thereto, and honored the same from its date of inception to the present time, including March 8, 1944.

On March 8, 1944, while petitioner, using its own truck under the management and control of an employee of petitioner, was in the act of making a delivery of gasoline to a storage tank of Cornelius Gilbert in Lynchburg, Virginia, an explosion occurred and a fire resulted which partially consumed and damaged the building of Gilbert and its contents.

In January, 1948 Gilbert instituted an action against Gulf Oil Corporation in the United States District Court for the Western District of Virginia to recover $365,529.77 for damages caused by the explosion and fire (R. 1). A jury trial resulted in a verdict and judgment for Gulf (R. 14-16), but this judgment was reversed on appeal for errors in the admission of evidence and in argument to the jury and the case was remanded to the District Court. *Gilbert* v. *Gulf Oil Corporation,* 175 F. (2d) 705.

The retrial of the Gilbert case in the District Court was

set for February 15, 1950 but was continued upon motion of Gilbert. At the June Term, 1950 of the District Court the case was reset for trial on October 2, 1950 (R. 18, 34).

On July 18, 1950 Gulf Oil Corporation instituted an action for damages against petitioner in the United States District Court for the Western District of Virginia (R. 17, 20, 41). The action of Gulf was predicated upon petitioner's obligation under clause TENTH, quoted above, of the contract between Gulf and petitioner to indemnify Gulf against expenses and liabilities incurred or which may be incurred in Gilbert's action against Gulf. Petitioner promptly filed its answer to Gulf's complaint and admitted existence of the contract of November 1, 1939 between Gulf Oil Corporation and petitioner (R. 28).

On July 25, 1950, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, petitioner filed its motion to intervene in the action brought by Gilbert against Gulf Oil Corporation (R. 17, 46). The motion to intervene was heard by the District Court on August 24, 1950 (R. 46). On August 29, 1950 the District Court entered an order denying the motion to intervene for the stated reasons that the motion was "neither timely nor does it appear that representation of applicant's interests by existing parties is or may be inadequate" (R. 46). An appeal from this order was taken by petitioner to the United States Court of Appeals for the Fourth Circuit. On January 5, 1951 the Court of Appeals entered a judgment affirming the prior action of the District Court, without any opinion or statement of reasons (R. 50).

There can be no doubt, of course, that an order of a District Court denying a motion to intervene as of right is a final, appealable order;[1] nor can there be any doubt

[1] *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519, 524-525; *California* v. *United States*, 180 F. 2d 596; and *Mack* v. *Passaic National Bank & Trust Co.*, 150 F. 2d 474.

that paragraph TENTH of the indemnity agreement between Gulf and petitioner (R. 26-27) imposes such an *absolute* obligation upon petitioner that it clearly will be bound within the meaning of Rule 24(a)(2) by any judgment that Gilbert may recover against Gulf.[2]

Specifications of Error to Be Urged

The United States Court of Appeals for the Fourth Circuit erred:

1. In affirming the action of the United States District Court in denying the motion of petitioner to intervene in the pending action brought by Gilbert against Gulf Oil Corporation.

2. In failing to hold that petitioner has the right under Rule 24(a) of the Federal Rules of Civil Procedure to intervene in the pending action brought by Gilbert against Gulf Oil Corporation.

3. In failing to reverse the order of the District Court denying the motion to intervene on the ground that it was not timely.

4. In failing to reverse the order of the District Court denying the motion to intervene on the ground that there was no showing that the representation of petitioner's interest is or may be inadequate.

5. In failing to grant the relief sought by petitioner in its appeal.

Reasons for Granting the Writ

The questions raised by this petition involve the interpretation and application of Rule 24(a) of the Federal Rules of Civil Procedure. This Rule controls intervention

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[2] *United States* v. *C. M. Lane Lifeboat Company*, 25 F. Supp. 410, 411; *Cohen* v. *Maryland Casualty Company*, 4 F. 2d 564, 567; *United States Casualty Company* v. *Taylor*, 64 F. 2d 521, 526; and *United States* v. *American Surety Company of New York*, 142 F. 2d 726, 728.

of right in all civil litigation in the federal courts. Rule 24(a) is of equally wide application, coverage and importance as are other Rules of Civil Procedure respecting which certiorari has been granted to settle important questions and problems of practice and construction.[3]

Although Rule 24(a) has been involved in several appeals to this Court,[4] in none of these has the Court had occasion to announce the governing principles to be applied in determining whether an application to intervene under Rule 24(a) is timely or to define the boundaries of intervention as of right under Rule 24(a)(2). It is a matter of great public importance that there should be an authoritative

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[3] *Ackermann* v. *United States*, 340 U. S. 193 and *Klapprott* v. *United States*, 335 U. S. 601 (Rule 60(b)); *Globe Liquor Co., Inc.* v. *San Rowan*, 332 U. S. 571 (Rule 50(b)); *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (Rule 50(b)); *Anderson* v. *Yungkau*, 329 U. S. 482 (Rules 25(a) and 6(b)); *Hickman* v. *Taylor*, 329 U. S. 495 (Rules 26, 33 and 34); *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U. S. 620 (Rule 56); *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203 (Rule 52(b)); *Reeves* v. *Beardall*, 316 U. S. 283 (Rule 54(b)); *Halliday* v. *United States*, 315 U. S. 94 (Rule 50(b)); *White* v. *Johnston*, 313 U. S. 538 (Rule 52(a)); *Berry* v. *United States*, 312 U. S. 450 and *Conway* v. *O'Brien*, 312 U. S. 492 (Rule 50(b)); *Sibbach* v. *Wilson & Co., Inc.*, 312 U. S. 1 (Rules 35 and 37); *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243 (Rule 50(b)).

[4] *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 176-178 (Denial of intervention affirmed, since provision of antitrust decree which interveners claimed affected their legal rights had been removed from the decree); *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519 (Denial of intervention by union in suit to enjoin railroad and employees from violating ICC order reversed, since Interstate Commerce Act gave union absolute right to intervene within meaning of Rule 24(a)(1)); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137 (Third party had no right under Rule 24(a)(2) to intervene in application of defendant subject to antitrust injunction for leave to acquire stock of competitor, since third party "clearly would not be bound by any judgment in the action"); *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (Competitor of defendant in antitrust suit by United States held entitled by terms of decree to intervene to enforce its rights under the decree, so that it was not necessary to consider application of Rule 24).

construction of Rule 24(a) by the Court to the end that the true intendment of the Rule may not be restricted.

The interpretation and application of Rule 24(a) by the United States District Court and the United States Court of Appeals for the Fourth Circuit are in direct conflict with the plain wording of the Rule, are in conflict with principles announced by other United States Courts of Appeals in interpreting and applying said Rule, and deprive civil litigants of rights which the Rule in clear language sought to provide.

1. *Since granting the motion to intervene at the time it was made would not have caused any inconvenience or prejudice, the motion was timely within the meaning of Rule 24(a).*—The action of Gilbert against Gulf Oil Corporation was instituted in January, 1948. A jury trial resulted in a judgment for Gulf which was reversed on appeal in *Gilbert* v. *Gulf Oil Corporation,* 175 F. (2d) 705. The case was set for retrial on October 2, 1950. On July 18, 1950 Gulf filed an action against petitioner on the indemnity contract. One week later, on July 25, 1950, which was over two months before the date set for trial, petitioner filed its motion for leave to intervene in Gilbert's action against Gulf. That the application to intervene was timely seems indisputable under the above facts.

The requirement of timely application for exercise of the right of intervention under Rule 24(a) was not intended to punish an intervener for not acting more promptly but rather was designed to insure that the original parties should not be prejudiced by the intervener's failure to apply sooner. In the instant case neither of the original parties in the action brought by Gilbert against Gulf Oil Corporation has changed position because of the absence of petitioner. The prejudice which counsel for Gil-

bert has suggested he will suffer from intervention at this stage consists of alleged delay of the trial (R. 34), which certainly was no natural consequence of intervention if the District Court had granted petitioner's motion filed more than two months before the date set for trial, and the difficulty allegedly arising from the admissibility of evidence heretofore taken by deposition or at the first trial against one defendant and not against the other (R. 37). Petitioner has already stated in its brief to the Court of Appeals that upon its intervention into this suit it "takes the case in its entirety, in its present status, and will pursue no tactics calculated to delay the speedy and expeditious disposition of the issues involved." Although this is a sufficient stipulation to protect plaintiff from any prejudice, any possible doubts on that score could have been removed by making petitioner's intervention subject to appropriate conditions.

The judgment of the Fourth Circuit Court of Appeals, affirming the action of the United States District Court in denying petitioner's motion to intervene as not timely, is in conflict with the construction and application of Rule 24(a) by the United States Court of Appeals for the District of Columbia in *Wolpe* v. *Poretsky*, 144 F. (2d) 505, *cert. den.* 323 U.S. 777. In that case the District Court enjoined the District Zoning Commissioners from enforcing a zoning ordinance and directed them to restore a rezoning classification. Thereafter the Zoning Commission voted not to take an appeal from the decree of the District Court. A month after the order of the District Court a number of property owners filed a motion to intervene in the District Court for the purpose of moving for a new trial or to appeal. The District Court denied the motion to intervene, but on appeal the Court of Appeals for the District of

Columbia reversed the District Court. The Court of Appeals held that under Rule 24(a) a timely application to intervene may be filed *after* a final decree and said (p. 508):

> "The application to intervene was timely. Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. Here at least one of the rights which cannot be protected without intervention is the right of appeal. The court was, therefore, in error in denying appellant's leave to intervene as a matter of right."

In *Pyle-National Co.* v. *Amos*, 172 F. (2d) 425, a motion to intervene was filed about two weeks before the date set for trial. The District Court denied the motion. On appeal the Court of Appeals for the Seventh Circuit reversed the order below with the comment that "we are not impressed by the argument that intervenor's petition was not timely."

In *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local 123*, 5 F.R.D. 174, 177, District Judge Mullins stated the standard of timeliness in the case of intervention of right as follows:

> "Where there is a right to intervene as distinguished from a permissive privilege to intervene, the timeliness of the application must be determined not merely by a desire to reduce the number of litigants or by the mere lapse of time, but by the test of prejudice or unfairness to the interests of the opposing party arising within the period between the filing of the complaint . . . and the time the application for intervention is made."

Other courts have affirmed the principle that the word "timely" in Rule 24(a) has nothing to do with the length of time that a case has been pending. Thus, in *Innis, Speiden & Co.* v. *Food Machinery Corp.*, 2 F.R.D. 261, 265, Circuit Judge Biggs, sitting as District Judge, said:

> "I cannot conclude upon consideration of all the circumstances that the application for intervention is not timely. While the case is nearly four years old it was not set for trial until the day upon which the application for intervention was made."

The judgment of the Fourth Circuit Court of Appeals in the instant case is inconsistent with the prior decision by that Court in *United States Casualty Co.* v. *Taylor*, 64 F. (2d) 521. That case arose under Equity Rule 37, which was somewhat narrower in scope than Rule 24(a) of the Federal Rules of Civil Procedure. In permitting intervention in that case Judge Soper said (p. 527):

> "The petition for intervention in this case was not too late. Counsel for the carrier had been permitted to take part in the case to support the findings of the Deputy Commissioner, and the petition of intervention was promptly filed after the adverse decree. Equity Rule 37 (28 U.S.C.A. Sec. 723), above quoted, declares that intervention may be permitted at any time and the decisions show that it may be allowed after a final decree when it is necessary to do so to preserve some right which cannot otherwise be protected. *United States* v. *Northern Securities Co.*, 128 F. 808, 810; *Cincinnati, I. & W. R. Co.* v. *Indiana Union Rwy. Co.*, 279 F. 356, 363."

An intervention of right under Rule 24(a) must be allowed unless the application is not timely in the sense that one of the original parties can show that he has changed his position irrevocably due to the absence of the intervener or his failure to intervene sooner. In other words, "timely" as used in Rule 24(a) imposes a practical requirement intended to prevent unfairness and has behind it an element of estoppel. In *Leary* v. *United States*, 224 U. S. 567, this Court reversed a decree of the Fourth Circuit Court of Appeals affirming the trial court's denial of a petition to intervene in a suit, although the petition was

filed more than four years after the suit was begun and after the evidence had been taken and the case was ready for final hearing. Mr. Justice Holmes, delivering the opinion of the Court, said that intervener had been dealt with "too technically" and concluded that leave to intervene should be granted, with the condition that the evidence already in should be taken as evidence against the intervener, subject to her right to recall and cross-examine plaintiff's witnesses.

2. *The representation of an indemnitor's interest by counsel for the indemnitee who is suing the indemnitor clearly "is or may be inadequate".*—Petitioner, by virtue of its contractual agreement to indemnify Gulf against any and all claims arising out of petitioner's operations, is the party ultimately liable for any judgment which may be rendered in favor of Gilbert against Gulf in the instant action for damages in excess of $365,000. Petitioner now finds itself the defendant in an action for indemnification instituted by Gulf to enforce that ultimate liability, and is being sued in that action through the same attorneys who represent Gulf in defending the action brought by Gilbert against Gulf. It is unrealistic to expect that attorneys who are representing Gulf in suing petitioner for indemnification will represent petitioner adequately through their representation of Gulf in defending against the claim as to which Gulf seeks indemnification from petitioner. It would be unfair to deny petitioner the right of intervention because of a mere speculation that its interests will be represented adequately by Gulf. It is contrary to human experience and behavior to assume that in this situation the interests of petitioner will not be subordinated to those of Gulf in the minds, attitude and vigor of defense exerted by the attorneys representing Gulf throughout the preparation for trial and trial of the case against Gulf. The

motion to intervene states that the representation of petitioner's interest by counsel for Gulf is inadequate (R. 18), and this statement is confirmed by the facts of the situation, which make it obvious that petitioner's interest may not be adequately represented by Gulf.

Representation of petitioner by involuntary proxy before a jury in a factual dispute, with no right in petitioner to determine what witnesses to use, to examine or cross-examine witnesses, or to participate to any degree in the trial and argument through its own counsel, is contrary to the simplest concept of adequate representation and in essence deprives petitioner of the right to trial before a jury in a proceeding which may result in the ultimate imposition of large liability upon petitioner and in which there are inconsistent positions between petitioner and Gulf (R. 43). Only by a highly artificial construction of Rule 24(a)(2) could such *nominal* representation be considered as other than *totally* "inadequate". Certainly the instant case is one where "the *practical necessities* grant the applicant an absolute right to intervene". *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519, 524 (Emphasis supplied).

In Moore's treatise on Federal Practice, the rule is stated as follows:

> "Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, *or if the representative has or represents some interest adverse to that of the petitioner*, or fails because of nonfeasance in his duty of representation." 4 Moore, Federal Practice (2d ed. 1950) § 24.08, p. 38. (Emphasis supplied).

In the instant case the indemnity provision appearing in clause TENTH of the contract between petitioner and Gulf Oil Corporation necessarily gives Gulf an interest adverse to petitioner's interest.

Before the adoption of the Rules of Civil Procedure the general rule was that an indemnitor had the right to intervene in an action against his indemnitee on a claim covered by the indemnification agreement. *Cohen* v. *Maryland Casualty Co.*, 4 F. (2d) 564, 567. Presumably the right was granted in recognition of the potential inadequacy of representation of the indemnitor's interests by the indemnitee, and there is no reason to suppose that the requirement of Rule 24(a)(2) as to inadequacy of representation was intended to limit or restrict that right. Cf: *United States* v. *American Surety Company of New York*, 142 F. (2d) 726, 728.

In *United States* v. *C. M. Lane Lifeboat Co.*, 25 F. Supp. 410, a party moved to intervene, claiming that the was bound by agreement to indemnify a defendant and therefore was entitled to defend the action. The court granted the motion to intervene under Rule 24(a)(2) and said (p. 411):

> ". . . there is something to be said as to the adequacy of the representation of his interest. He says that he is not on friendly terms with the attorney who in effect is representing his interest."

Certainly, if representation may be inadequate because the intervener is not on friendly terms with the attorney of the representative party, representation of an indemnitor through an attorney of an indemnitee who is suing the indemnitor on the indemnity agreement may not be adequate.

In *Wolpe* v. *Poretsky, supra*, the United States Court of Appeals for the District of Columbia cited with approval (p. 507) the holding of the District Court in the case of *United States* v. *C. M. Lane Lifeboat Co., supra.* Just as the failure of the Zoning Commission to take an appeal in *Wolpe* v. *Poretsky, supra*, indicated to the court that its representation of the interests of the interveners was in-

adequate, so the filing of suit for indemnity by Gulf against petitioner is a clear indication that Gulf's presentation of petitioner's interest is, or may be, inadequate as well as a notice to petitioner that Gulf looks to it, as the party ultimately liable, to defend its own interests (R. 20-24).

The courts have recognized that it is not enough for adequate representation that the representative party might be expected to prefer a result which would protect the interests of the party seeking to intervene. Often in such a situation there is no assurance that the intervener's interests will be protected with the same energy that the intervener would exert. Thus, in *Innes, Speiden & Co. v. Food Machinery Corp.*, 2 F. R. D. 261, Circuit Judge Biggs, sitting in the District Court, held that a licensee of patent rights in Florida and several other states could intervene in a suit by its licensor for infringement of the patent although the licensor apparently still held the beneficial interest in the patent in other areas involved.

It is difficult to see how a party in petitioner's position of ultimate liability could be represented adequately without the opportunity to appear by its own counsel, confront and cross-examine witnesses, make statements to the jury, and otherwise participate in the trial as a party litigant. In plain fairness, reason and justice, the petitioner should have the opportunity to participate in the trial to protect its rights. Certainly, there is *grave risk* that the interest of petitioner will, or may, be inadequately represented by the attorneys for Gulf.

Conclusion

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

ROYSTON JESTER, III,
People's National Bank Building,
Lynchburg, Virginia;
MAC ASBILL,
1012 Ring Building,
Washington 6, D. C.,
Counsel for Petitioner.

FEBRUARY 14, 1951.

MAR 9 1951
CHARLES ELMORE CROPL
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(In the case of Cornelius Gilbert, doing business, etc., Plaintiff, versus Gulf Oil Corporation, Defendant)

Brief of Cornelius Gilbert, etc., in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MAX J. GWERTZMAN,
116 John Street, New York City, N. Y.

WILLIAM S. MUNDY, JR.,

E. MARSHALL FROST,

WILLIAM ROSENBERGER, JR.,
Peoples National Bank Bldg.,
Lynchburg, Va.
Attorneys for Cornelius Gilbert, etc.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 48 NEW CHAMBERS ST., N. Y.

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(In the case of Cornelius Gilbert, doing business, etc., Plaintiff, versus Gulf Oil Corporation, Defendant)

Brief of Cornelius Gilbert, etc., in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Reasons for Denying of Writ

Rule 24 (a) of the Rules of Civil Procedure provides that intervention should not be permitted unless (a) the application is timely made, and (b) there are facts presented to show that the representation of the one seeking intervention is or may be inadequate by the parties to the pending action. The District Court denied the application for intervention both on the ground that it was not timely made and that there was no evidence of inadequate representation (Transcript of Record, p. 41).

This finding was affirmed by the United States Court of Appeals. The record amply sustains the finding of the lower Court and the discretion of the Court was not abused.

POINT I

The motion for intervention in this case is improper on the ground that it was not timely made and there is no evidence to indicate inadequate representation.

(a) There was a lack of timeliness in making the application.

The original action herein was instituted by the plaintiff, Gilbert, against the defendant, Gulf Oil Corporation, in the United States District Court for the Southern District of New York in May, 1945. The petitioner was well aware of that action. Its president signed an affidavit for the attorneys representing Gulf Oil Corporation which was used in the motion of dismissal in that action (Transcript of Record, pp. 39-40). In this affidavit the petitioner's president makes the following statement:

> "My company is engaged principally in the sale and distribution of petroleum products in Lynchburg, Va. and vicinity. My company has a contract with Gulf Oil Corporation for the sale and distribution of its products in the aforementioned territory."

Thereafter, the attorneys for the petitioner took part in and attended at the taking of various depositions,

sat in on the trial of the action and also sat in on various motions during the progress of this case (Transcript of Record, p. 43). The action was tried completely, was brought to the United States Circuit Court of Appeals for the Fourth Circuit on appeal, was reversed, and now, on the eve of the second trial, the petitioner seeks to intervene in this action despite the fact that it was well aware for five years of the progress of this action and was perfectly content to sit back and permit the plaintiff and the defendant to litigate the action without it although presumably subject to the contract upon which the alleged action by the defendant against the petitioner is based.

Mr. Justice Barksdale, in denying the motion for intervention has stated that it was not timely made (Transcript of Record, p. 46). In the case of *Union National Bank of Youngstown* v. *Superior Steel Corporation,* 9 F. R. D., 124, it appeared that the plaintiff as trustee was the holder of two patents. The defendant allegedly infringed on the patents. An action was started by the plaintiff against the defendant in 1946. The United Engineering and Foundry Co. was notified by the defendant of the suit under the terms of an indemnification agreement existing between the defendant and the said United Engineering and Foundry Co. The United Engineering and Foundry Co. sat in and conferred in connection with the defense. In January, 1949, counsel for the United Engineering and Foundry Co., for the first time moved to intervene. The motion was denied and the Court held that it is usually too late to move for intervention either after a trial has begun or shortly before its commencement, and that the matter of timeliness is in the sound discretion of the Trial Court.

In the case of *Lockwood* v. *Hercules Powder Co.,* 7 F. R. D., 24, the Court, in construing Rule 24 (a) of the Rules of Civil Procedure, said:

> "However, said rule is silent as to what constitutes a timely application, so in this as in other cases the answer must be found in the sound discretion of the trial court. *Simms* v. *Andrews*, 10 Cir. 118 Fed. 2d 803."

In the case of *Mullens* v. *De Soto Sec. Co.*, 2 F. R. D., 502, the District Judge rendered the following opinion with reference to timeliness under Rule 24 (a):

> "Courts are unanimous in requiring prompt action on the part of an intervenor who seeks to assert rights to a suit to which he is not a party. *U. S.* v. *Columbia Gas & Electric Corp.*, 27 Fed. Supp. 116. The rule is silent as to what constitutes timely application and the question must therefore be answered in each case by the exercise of sound discretion by the trial court. *Simms* v. *Andrews*, 10 Cir. 118 F. 2d, 803. See also *Tachna* v. *Insuranshares Corp. of Delaware*, 25 F. Supp. 541; *White* v. *Hanna*, 10 Cir. 126 F. 2d, 559; *American Brake Shoe & Foundry Co.* v. *Interboro Rapid Transit Co.*, 2 Cir. 112 F. 2d 669."

To the same effect, see also:

> *In Re Rumsey Mfg. Corp.*, 9 F. R. D., 93.

Based on the facts in this case which indicate that 5 years elapsed during which the intervenor did nothing although it was fully and completely aware of the situation, it clearly appears that the District Court certainly did not abuse its discretion in making the finding that the motion for intervention was not timely made.

(b) There is no evidence of inadequate representation.

The petitioner is a mere creature of the defendant Gulf Oil Corporation. Under the authority of *Gulf Refining Co.* v. *Brown,* 93 F. 2d, 870, the contract in this case between Gulf Oil Corporation and the petitioner was held to be in fact a sham and the petitioner was held to be an employee and agent of the Gulf Oil Corporation. It is obvious that Gulf Oil Corporation is really behind this application for intervention. Its purpose is to create prejudice against the plaintiff in the following manner: Gulf Oil Corporation well knows that the petitioner is a mere dummy and depends for its very life upon the whim and will of Gulf Oil Corporation. Its existence can be snuffed out by a mere ten days' notice. It owns no property other than its own trucks. It has to remit all moneys to Gulf Oil Corporation and merely receives a commission which is no different than a wage. The very property in which it is located is owned lock, stock and barrel by Gulf Oil Corporation. The very structure of petitioner is a mere device which Gulf Oil Corporation has invented to make it appear that the public is in fact dealing with a small independent outfit while in truth it is dealing with a large oil company (Transcript of Record, pp. 24-27). By this device Gulf Oil Corporation was in the hope of avoiding responsibility for negligent operations for which it would normally be responsible, and attempts to foist responsibility upon financially irresponsible distributors. While it sought to avoid this responsibility it still made sure to retain full and complete control of all of its products and especially of the moneys collected in the sale of its products, and of the manner in which its products were being handled. While the Courts have readily recognized the true picture and proper status of

the parties (*Gulf Refining Co.* v. *Brown, supra*), the jury unfortunately may not be able to comprehend these facts and may be deluded into believing that if a large judgment is in fact rendered against Gulf Oil Corporation, the small, local distributor, the petitioner herein, will in fact be compelled to reimburse Gulf Oil Corporation for a loss even though by the very nature of its financial resources such reimbursement is a patent impossibility.

While no one quarrels with the proposition that a litigant is entitled to be represented by counsel of its own choice, we are certain that this Court will not be blinded to the practical realities which exist herein in view of the foregoing facts. There is not a scintilla of evidence in the moving papers submitted by the petitioner to indicate that counsel employed by the Gulf Oil Corporation are incompetent, dishonorable or unfaithful to their task. On the contrary, an examination of the record indicates that the attorneys for the defendant Gulf Oil Corporation have with the utmost vigor prosecuted the defense of this action in every possible and conceivable manner. When the action was first instituted in the Southern District of New York they moved to dismiss the action on the ground of the doctrine of "*forum non conveniens*" which at that time was practically unknown. They succeeded in obtaining a dismissal of the action in that forum (62 Fed. Supp. 291). When the dismissal was vacated by the United States Court of Appeals (153 Fed. 2d, 883), they promptly moved for a writ of certiorari and succeeded in having this Court reverse the United States Court of Appeals (330 U. S. 501). Nothing testifies more eloquently to their ability in the defense of the action itself than the verdict which they received from the jury in favor of the defendant Gulf Oil Corporation. The reversal by the United States Court of Appeals (175 Fed. 2d, 705) was based on errors

in the reception of evidence and overzealousness but did not reflect on the ability of the defendant's counsel. As a matter of fact, the petitioner apparently used S. H. Williams, one of the attorneys for Gulf Oil Corporation, as its own attorney in 1944 in connection with investigations in this case (Transcript of Record, pp. 36, 38).

In the case of *McDonald* v. *United States,* 119 F. 2d, 821, at page 827, the United States Court of Appeals for the Ninth Circuit stated:

> "Subdivision (a) of Rule 24, permitting intervention as a matter of right, provides, as far as pertinent here, that the application shall be granted 'when the representation of the appellant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action.' Both conditions must be shown to exist."

In the case of *Fielding* v. *Allen,* 9 F. R. D., 106, it was held that failure to show specific facts as to how representation is inadequate is a bar to intervention.

See also:

Tachna v. *Insuranshares Corporation of Delaware,* 25 Fed. Supp. 541;

Kind v. *Markham,* 7 F. R. D., 265.

> "Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the petitioner, or fails because of nonfeasance in his duties of representation."

Moore's Fed. Prac., 2nd Ed., Vol. 4, pp. 38-39.

> "Even though the applicant might be bound by the judgment, he cannot intervene as of right if he is in fact adequately represented by the existing parties to the action."
>
> *Moore's Fed. Prac.*, 2nd Ed., Vol. 4, p. 37.

In the case of the *United States* v. *C. M. Lane Lifeboat Co.*, 25 F. Supp. 410, upon which the petitioner relies heavily, the following significant statement appears in the opinion:

> "Then, too, there is something to be said as to the adequacy of the representation of his interest. He says that he is not on friendly terms with the attorney who in effect is representing his interest."

It was on this ground particularly that the motion to intervene was allowed.

In the case at bar we find that the attorneys for the Gulf Oil Corporation were in fact used by the petitioner in the preliminary investigations of the case (Transcript of Record, p. 38). From 1945 down to the present time the petitioner has been very happy and content to sit back and have the attorneys for the Gulf Oil Corporation handle all phases of this litigation. Nowhere in this record is there any declaration as to collusion, nonfeasance or adverse representation. As a practical matter, can much faith be given to the petitioner's attempt to impress this Court with its grave predicament where the net worth of the petitioner does not exceed $10,000.00, according to its own statements. (See deposition of James F. Jennings, Rec. 5855), where the action is being prosecuted for the sum of $365,529.77? Is this Court to believe that the Gulf Oil Corporation, which is primarily faced with the possibility of having judgment render-

ed against it for the foregoing sum, going to abandon or weaken its defenses with the sole hope of attempting to recover $10,000.00 from the Jennings-Watts Oil Co., Incorporated, the petitioner herein, even though the latter is a mere creature of the Gulf Oil Corporation and is dependent for its very life on the whim of the Gulf Oil Corporation? Certainly, based on the realities of the situation, on the facts in the record, on the lack of any evidence in the record to indicate any inadequate representation, the Trial Court and the United States Court of Appeals were more than justified in denying the motion for intervention on this ground. Under Rule 24 (a), the motion for intervention, even as a matter of right, cannot be granted unless the elements of timeliness and inadequate representation are present. In this case, the record on its face indicates that there was a lack of timeliness and that there was adequate representation. The Courts below have found in their discretion that these elements have not been complied with and certainly the facts adequately support their conclusion.

CONCLUSION

The petition for the granting of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

MAX J. GWERTZMAN,
116 John Street, New York City, N. Y.

WILLIAM S. MUNDY, JR.,

E. MARSHALL FROST,

WILLIAM ROSENBERGER, JR.,
Peoples National Bank Bldg.,
Lynchburg, Va.
Attorneys for Cornelius Gilbert, etc.

Certificate of Service

I, the undersigned, one of the attorneys of record for Cornelius Gilbert, doing business under the firm name and style of Gilbert Storage and Transfer Company, DO HEREBY CERTIFY that I have this day served the within brief upon Royston Jester, III, Esq., attorney for the Petitioner, by delivering a printed copy of the within brief to said attorney by mailing a copy thereof by United States mail, postage prepaid, at No. 1002 Peoples National Bank Building, Lynchburg, Virginia.

This 7th day of March, 1951.

MAX J. GWERTZMAN,
Attorney for Gilbert Storage and Transfer Company.

MAR 13
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 549

JENNINGS-WATTS OIL COMPANY, INCORPORATED,
Petitioner,

vs.

CORNELIUS GILBERT, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GILBERT STORAGE AND TRANSFER COMPANY, ET AL.

(In the Case of Cornelius Gilbert, Doing Business, etc., Plaintiff, versus Gulf Oil Corporation, Defendant)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ROYSTON JESTER, III,
Lynchburg, Virginia,
MAC ASBILL,
Washington, D. C.,
Counsel for Petitioner.

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REPLY BRIEF FOR PETITIONER

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1. *Respondent has submitted no authority or reason which supports his contention that petitioner's motion to intervenely was not timely.*—Throughout his brief respendent overlooks the fact that the action in which petitioner seeks to intervene was instituted by Gilbert against Gulf Oil Corporation in the Western District of Virginia during January, 1948 (R. 1).

In none of the District Court decisions relied upon by respondent on the question of timeliness did the motions to intervene meet the other requirements of Section 24 (a) for intervention of right.

In *Union National Bank of Youngstown* v. *Superior Steel Corp.*, 9 F. R. D. 124, the indemnitor of defendant moved to intervene to oppose the motion of plaintiff to dismiss its own complaint. The dismissal could not prejudice or bind the indemnitor, and no reason existed why the intervention should be allowed.

In *In Re Rumsey Mfg. Corp.*, 9 F. R. D. 93, the United States attempted to intervene in a District Court proceeding to act as an *observer* and *not* as a *combatant* whereas its rights were sufficiently protected in the pending bankruptcy proceeding in which it had presented its claim.

Lockwood v. *Hercules Powder Company*, 7 F. R. D. 24, involved only permissive intervention under Rule 24 (b), not intervention of right under Rule 24 (a).

In *Mullins* v. *De Soto Securities Co.*, 2 F. R. D. 502, no grounds existed for an intervention of right. Moreover, the application to intervene was not made until plaintiff's case had been dismissed in a written opinion, and while a motion for rehearing was pending.

Respondent has utterly failed to show that any prejudice or inconvenience to him would, or could, have resulted if the District Court had granted the motion to intervene at the time it was made, which was two months before the date set for trial. The motion to intervene was timely. Cf. *De Korwin* v. *First National Bank of Chicago*, 94 F. Supp. 577, 578.

2. *Respondent has failed to rebut petitioner's showing that the representation of its interest by its indemnitee "is or may be inadequate."*.—Petitioner's interest in respondent's action against Gulf arises from paragraph Tenth of

the contract of November 1, 1939, between petitioner and Gulf Oil Corporation (R. 27). That paragraph of the contract indemnifies Gulf against *any and all claims* arising from petitioner's operation and covers claims based on negligence, or otherwise, so the obligation of petitioner as indemnitor is *absolute*. Cf. *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, 89 N. E. 2nd 415, 417. The indemnity agreement clearly makes petitioner an indemnitor to save Gulf harmless from such claims as that on which Gilbert is suing Gulf. The sole purpose of intervention by petitioner in the action by Gilbert against Gulf Oil Corporation is to be able to participate in the defense of that action so as to preclude Gilbert from making a recovery against Gulf, the burden of which would inevitably be passed on to petitioner under its absolute obligation created by the indemnity agreement. In such a situation the "practical necessities" grant petitioner an absolute right to intervene, because there is no other proceeding in which petitioner may protect its interest. *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U. S. 519, 524.[1]

Whether the agreement of November 1, 1939 (R. 24) between petitioner and Gulf gives petitioner the status of independent contractor, or that of an agent or employee of Gulf, is totally immaterial. In either event petitioner has bound itself absolutely under paragraph Tenth of said agreement (R. 27) to indemnify Gulf against any and all

[1] While execution could not issue directly against petitioner's property on a judgment in favor of Gilbert against Gulf, it would be quite a simple matter for Gulf to institute a separate legal proceeding against petitioner—a step which Gulf has in fact already initiated—in order to secure the aid of court process in enforcing petitioner's absolute obligation to indemnify Gulf against the judgment. In such a proceeding Gulf could put in evidence the indemnity contract and the judgment against it, and petitioner would have no defense, *unless* it could prove fraud, collusion or negligence of Gulf in the trial of the action in which the judgment was obtained against Gulf. *United States* v. *C. M. Lane Lifeboat Co.*, 25 F. Supp. 410, 411.

claims arising from petitioner's operations. Hence, the case of *Gulf Refining Company* v. *Brown*, 93 F. (2d) 870, relied upon by respondent, has no bearing on the application of Rule 24 (a), because in that case the court merely held that Gulf was liable as principal to a third party injured by operations of a distributor of Gulf products, and did *not* pretend to hold that an agent or employee may *not* voluntarily bind itself under an indemnity agreement with its principal.

The brief of respondent relies primarily upon an assumed financial worth of petitioner which is not shown in the record. The right to intervene provided by Rule 24 (a) is not expressly or impliedly conditioned upon, or measured by, the financial standing of an intervener or of any party to the litigation. In this case intervention is necessary adequately to protect *whatever* present assets petitioner may own and to safeguard its possibilities of future development. Justice and fairness demand that petitioner should *not* be *forced to* entrust its representation to the same counsel who are suing petitioner on the indemnity agreement. It is questionable whether the same counsel could ethically accept this type of dual employment if it were voluntarily offered to them.

Another assumption of respondent is fundamentally unsound. It seems too obvious for argument that the successful advocacy by one set of Gulf attorneys of the *forum non conveniens* doctrine (*Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501) furnishes no proof or assurance that an entirely different set of Gulf attorneys (R. 13) will adequately represent the interest of petitioner in a trial, before a local jury in Virginia, of the factual issues involved in the pending litigation initiated by Gilbert against Gulf in 1948. In the latter litigation the attorneys representing Gulf necessarily occupy an inconsistent position with respect to peti-

tioner since they are attorneys for Gulf in a pending action against petitioner on its indemnity agreement (R. 24).

The word "may", as used in the clause "is or may be inadequate" appearing in Rule 24 (a) (2), should be construed in its ordinary sense to mean "might possibly". *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 411; *State ex rel, English* v. *Ruback*, 281 N. W. 607, 610. Certainly, the representation of petitioner's interest, in an action brought against its indemnitee (Gulf) by Gilbert in which any judgment rendered against Gulf will be binding on petitioner, "might possibly" be inadequate where the same counsel for the indemnitee in that action also represent the indemnitee in its pending action against petitioner to enforce the indemnity agreement. To say the least, there is a "reasonable possibility" that the representation of petitioner's interest by counsel for Gulf may be inadequate. *Federal Trade Commission*v. *Morton Salt Co.*, 334 U. S. 37, 46.

3. *Allowance of intervention will not divest the Federal Court of jurisdiction.*—An argument made by respondent in the lower courts, to the effect that intervention by petitioner would destroy the diversity of citizenship necessary for Federal jurisdiction of the action (R. 34-35), is not urged in respondent's brief. Of course, there can be no doubt that the intervention will be ancillary or auxiliary to Gilbert's action against Gulf and that its allowance will not take away the jurisdictional ground of diverse citizenship, although petitioner and Gilbert are citizens of Virginia, since the presence of petitioner is not essential to a decision of the controversy between the original parties. *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 53-54.[2]

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[2] To the same general effect see *City of Orangeburg* v. *Southern Ry. Co.*, 134 F. (2d) 890, 894; *Division 525, Order of Ry. Conductors of America*

Conclusion

It is respectfully submitted that the petition for writ of certiorari should be granted.

ROYSTON JESTER, III,
Peoples National Bank Building,
Lynchburg, Virginia;

MAC ASBILL,
1012 Ring Building,
Washington 6, D. C.;
Counsel for Petitioner.

March 12, 1951.

Certificate of Service

I, the undersigned, one of the attorneys of record for Jennings-Watts Oil Company, Incorporated, do hereby certify that I have this day served the within reply brief upon Max. J. Gwertzman, attorney for respondent, by delivering a printed copy of the within brief to said attorney by mailing a copy thereof to him by United States mail, postage prepaid, at 116 John Street, New York City, New York.

This 12th day of March, 1951.

MAC ASBILL,
Attorney for Jennings-Watts Oil Company, Incorporated,
Petitioner.

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v. *Gorman*, 133 F. (2d) 273, 277; *Boesenberg* v. *Chicago Title & Trust Co.*, 128 F. (2d) 245, 247; *Williams* v. *Keyes*, 125 F. (2d) 208, 209; *Kentucky Natural Gas Corporation* v. *Duggins*, 165 F. (2d) 1011, 1015; *Drumright* v. *Texas Sugarland Co.*, 16 F. (2d) 657; *Sun Oil Co.* v. *Humble Oil & Refining Co.*, 88 F. Supp. 658. See also 4 Moore, *Federal Practice* (2d ed. 1950), § 24.18, p. 135.